Office - Supreme Court, U.S.
FILED
SEP 21 1981
ALEXANDER L. STEVAS
CLERK

NO. 80-2079

in the Supreme Court of the United States

October Term, 1981

JANET RENO, State Attorney of Dade County, Florida, and JIM SMITH, Attorney General of Florida,
Petitioners

vs.

CONCERNED DEMOCRATS OF FLORIDA, and EDWARD COHEN, President of Concerned Democrats of Florida,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Steven Wisotsky
Michael R. Masinter
Nova University Law Center
3100 S.W. Ninth Avenue
Ft. Lauderdale, FL 33315
(305) 522-2300
Counsel for Respondents

QUESTION PRESENTED

WHETHER THE COURT OF APPEALS APPLIED SETTLED DOCTRINE IN AWARDING ATTORNEY'S FEES PURSUANT TO 42 U.S.C. §1988 IN A CASE IN WHICH THE DISTRICT COURT TWICE HAD FAILED TO COMPLY WITH THE CONTROLLING PRECEDENTS IN, FIRST, DENYING FEES AS "INAPPROPRIATE" AND THEN, ON REMAND AFTER REVERSAL, AGAIN DENYING FEES AS "INAPPROPRIATE" BY AGGREGATING AS "SPECIAL CIRCUMSTANCES" FIVE FACTORS THAT THE COURT OF APPEALS EXPLICITLY HAD HELD NOT TO CONSTITUTE "SPECIAL CIRCUMSTANCES"

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

THE COURT OF APPEALS APPLIED SETTLED DOCTRINE IN AWARDING ATTORNEY'S FEES PURSUANT TO 42 U.S.C. §1988 IN A CASE IN WHICH THE DISTRICT COURT TWICE HAD NOT COMPLIED WITH THE CONTROLLING PRECEDENTS OF THE CIRCUIT IN, FIRST, DENYING FEES AS "INAPPROPRIATE" AND THEN, ON REMAND AFTER REVERSAL, AGAIN DENYING FEES AS "INAPPROPRIATE" BY AGGREGATING AS "SPECIAL CIRCUMSTANCES" FIVE FACTORS THAT THE COURT OF APPEALS EXPLICITLY HAD HELD NOT TO CONSTITUTE "SPECIAL CIRCUMSTANCES."

CONCLUSION 10

TABLE OF AUTHORITIES

Cases	Pages
Aware Woman Clinic, Inc. v. City of Cocoa Beach, Fla., 626 F.2d 1146 (5th Cir. 1980)	7, 8
Brown v. Culpepper, 559 F.2d 274 (5th Cir. 1977)	6, 9
Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)	6
Davis v. Roadway Express, Inc., 590 F.2d 140 (5th Cir. 1979)	9
Henderson v. Fort Worth Independent School District, 574 F.2d 1210 (5th Cir. 1978)	4
Hutto v. Finney, 437 U.S. 678 (1978)	6
International Oceanic Enterprises, Inc. v. Menton, 614 F.2d 502 (5th Cir. 1980)	6, 8
International Society for Krishna Consciousness, Inc. v. Collins, 609 F.2d 151 (5th Cir. 1980)	7
Iranian Students Association v. Edwards, 604 F.2d 352 (5th Cir. 1979)	4, 8

TABLE OF AUTHORITIES (Continued)

Cases	Pages
Johnson v. State of Mississippi, 606 F.2d 635 (5th Cir. 1979)	6
Maher v. Gagne, ___ U.S. ___, 100 S.Ct. 2570 (1980)	8
Mahoning Women's Center v. Hunter, ___ U.S. ___, 100 S.Ct. 3006 (1980)	7
Maine v. Thiboutot, ___ U.S. ___, 100 S.Ct. 2502 (1980)	8
Morrow v. Dillard, 580 F.2d 1284 (5th Cir. 1978)	6
Supreme Court of Virginia v. Consumers Union of the United States, ___ U.S. ___, 100 S.Ct. 1967 (1980)	6
Statutes	
42 U.S.C. §1983	1, 5, 6, 8
42 U.S.C. §1988	*Passim*
Fla.Stat. §105.09	1, 5

STATEMENT OF THE CASE

The respondents are the Concerned Democrats of Florida and Edward Cohen, President. Respondents were prevailing plaintiffs in their lawsuit, filed under 42 U.S.C. §1983, for declaratory and injunctive relief against *Fla. Stat.* §105.09. Subsection one of the statute prohibited a "partisan political organization" from endorsing any candidate for election to judicial office. Under subsection two of the statute, a violation of subsection one was a misdemeanor of the second degree. The District Court agreed that the statute was unconstitutional, granted preliminary relief, and subsequently permanently enjoined the defendants from enforcing the statute in an opinion reported at 458 F.Supp. 60 (S.D. Fla. 1978).

As the prevailing party plaintiffs in the trial court, the respondents moved for an award of attorney's fees pursuant to 42 U.S.C. §1988. The District Court denied the motion without citation of authority, stating only that "the court concludes that an award of attorney's fees would be inappropriate in this case."

Respondents appealed to the United States Court of Appeals for the Fifth Circuit. The court of appeals placed the matter on the summary calendar, reversed the district court, and remanded "for an appropriate award of fees or for a finding on and a statement of the special circumstances which render such an award unjust." *Concerned Democrats of Florida v. Reno*, 601 F.2d 891, 892 (5th Cir. 1979). On remand, the district court again denied a fee award as "inappropriate" in a memorandum opinion reported at 493 F.Supp. 660 (S.D. Fla. 1980). As grounds for denying the motion for fees, the district

court aggregated five factors that had previously been held by the court of appeals not to constitute the requisite "special circumstances." *Id.* at 664.

Respondents filed a second appeal. The court of appeals again placed the cause on the summary calendar, reversed the district court, awarded respondents a fee of $3,262.50 for services performed prior to the first appeal, and reserved ruling with respect to fees for the two appeals. This unpublished opinion is set forth as "Appendix A" to the Brief of Petitioners.

The petitioners then filed a petition for rehearing or for rehearing en banc, which was denied by the court of appeals on February 9, 1981. Their petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

THE COURT OF APPEALS APPLIED SETTLED DOCTRINE IN AWARDING ATTORNEY'S FEES PURSUANT TO 42 U.S.C. §1988 IN A CASE IN WHICH THE DISTRICT COURT TWICE HAD FAILED TO COMPLY WITH THE CONTROLLING PRECEDENTS IN, FIRST, DENYING FEES AS "INAPPROPRIATE" AND THEN, ON REMAND AFTER REVERSAL, AGAIN DENYING FEES AS "INAPPROPRIATE" BY AGGREGATING AS "SPECIAL CIRCUMSTANCES" FIVE FACTORS THAT THE COURT OF APPEALS EXPLICITLY HAD HELD NOT TO CONSTITUTE "SPECIAL CIRCUMSTANCES"

The petition for writ of certiorari should be denied because petitioners have failed to make even a colorable showing that the judgment below falls within the criteria for review under Rule 17. Rule 17 specifies that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."

Petitioners' "Argument" is set forth on pages 3-6 of their brief. Not a single line of it addresses the issue of why certiorari should be granted. Instead, petitioners, in their single-minded devotion to exhausting the litigative opportunities presented by this case, have reargued the merits of the decision below as though this Court were simply another rung in the appellate ladder. The petition is thus legally insufficient and ought to be denied.

A second reason for denying the writ is that the decision of the court of appeals was not only correct but routine. It constituted no more than an application of the "well-settled" rule, *Iranian Students Assoc. v. Edwards*, 604 F.2d 352, 353 (5th Cir. 1979), that a prevailing party plaintiff is presumptively entitled to fees under §1988 in the absence of special circumstances that would render an award unjust. This has been the consistent position of the court of appeals, and it has been followed in *every* case, with the arguable but sole exception of *Henderson v. Fort Worth Independent School District*, 574 F.2d 1210 (5th Cir. 1978), *vacated on rehearing en banc*, 584 F.2d 115 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979). The *Henderson* case, of course, "has no precedential value," 584 F.2d at 115. Thus, the decision of the court of appeals in reversing the district court in the case at bar follows settled practice, which has not been shown by petitioners to be in conflict with a decision of this Court or a decision of another court of appeals on the same matter. Rule 17.1(a), (c).

In its opinion on remand, the district court acknowledged the unanimity of Fifth Circuit precedent by noting that "[f]ollowing the Supreme Court's language in *Newman* [*v. Piggie Park Enterprises*, 390 U.S. 400 (1968)], the Fifth Circuit has continually awarded fees to prevailing parties." *Concerned Democrats v. Reno*, 493 F.Supp. 660, 662 (S.D. Fla. 1980). Nevertheless, the district court was "still of the opinion that an award of attorney's fees is inappropriate." *Id.* at 663.

The crux of the court's conclusion is contained in the following language, *id.* at 664:

> The Fifth Circuit has rejected (1) good faith on the part of defendants; (2) a finding of unintentional discrimination; (3) plaintiff's financial ability to pay counsel fees; (4) defendant's good-faith belief that a challenged statute is valid; and (5) that the burden of a fee award will fall on the taxpayers, as insufficient to constitute special circumstances rendering an award of attorney's fees unjust. However, this case combines all five of these factors with the added ingredient of a plaintiff who is a partisan, political organization. Added together they rise to the level of "special circumstances."

That conclusion was not only contrary to the well settled law of the circuit, it was illogical as well. The underlying intellectual process consisted of aggregating a series of legal nullities to produce "special circumstances." Using a mathematical model, it would be analogous to asserting that $5 \times 0 = 5$.

Furthermore, the district court's enumeration tends to obscure the matter in issue because the five factors actually overlap and duplicate one another. The first and fourth factors, in the circumstances of the case, are necessarily one and the same. No specific action or conduct of the petitioners was challenged apart from their readiness to enforce the criminal sanction of the challenged statute against the respondents in the event they violated its prohibition; *Fla. Stat.* §105.09 was alleged to be facially unconstitutional. For the same reason, the second factor ("unintentional discrimination") is also irrelevant to the case at bar. And the fifth factor cited by the district court (a burden on the taxpayers) is simply irrational: since an action under 42 U.S.C.

§1983 lies only for actions taken under color of law, the defendant will almost always be a public official, except in the relatively rare cases in which the plaintiff establishes state action on the basis of a public function or nexus theory, e.g., *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). In the ordinary §1983 case, the defendant will be a public official sued in his official capacity and the burden of the fee award will be borne by the public. *International Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502, 503-04 (5th Cir. 1980). As this Court has said, "[f]ee awards against enforcement officials are run-of-the-mill occurrences . . . ." *Supreme Court of Virginia v. Consumers Union of the United States*, ____ U.S. ____, 100 S.Ct. 1967, 1978 (1980).

Thus, when the district court's opinion on remand is stripped of its rhetorical flourishes, the aggregated five factors are reduced to two: The good faith of the defendant and the plaintiff's financial ability to pay for counsel. Neither of these constitutes special circumstances in the context of applying §1988. This Court held in *Hutto v. Finney*, 437 U.S. 678, 693 (1978), that an award of fees under §1988 was independent of any finding of bad faith on the part of the defendants. And in the Fifth Circuit, a long line of cases has consistently rejected good faith as constituting "special circumstances," e.g., *Johnson v. State of Mississippi*, 606 F.2d 635, 637 (5th Cir. 1979); *Morrow v. Dillard*, 580 F.2d 1284, 1298 (5th Cir. 1978), and *Brown v. Culpepper*, 559 F.2d 274, 278 (5th Cir. 1977). Nevertheless, the district court insisted that the good faith of the defendants "clearly has to figure in somewhere. . . ." *Concerned Democrats v. Reno*, 493 F.Supp. 660, 663 (S.D. Fla. 1980).

Similarly, the financial ability of a plaintiff to pay for counsel has been repeatedly rejected by the court of appeals as irrelevant to the purposes of §1988. See the cases cited in *International Society for Krishna Consciousness, Inc. v. Collins*, 609 F.2d 151, 151-52 (5th Cir. 1980).

Notwithstanding this unanimous weight of authority, the district court asserted that it "must be free at least to consider plaintiff's financial position," *Concerned Democrats v. Reno*, 493 F.Supp. 660, 664 (S.D. Fla. 1980), and went on to "*assume*" that respondents "could certainly pay for their own counsel." *Id.* at 664 (emphasis added).

Additionally, both the good faith and means-of-the-plaintiff "defenses" to §1988 appear to have been rejected by this Court in *Mahoning Women's Center v. Hunter*, ___ U.S. ___, 100 S.Ct. 3006 (1980). Although *Mahoning* was a summary disposition, the Fifth Circuit drew the above inference based upon the questions presented in the petition for writ of certiorari and the cases cited by this Court in its memorandum opinion: "The results in *New York Gaslight Club* and *Consumers Union* indicate that neither the good faith of the parties nor the means of the plaintiff were appropriate grounds for the denial of a §1988 fee award in *Mahoning*." *Aware Woman Clinic, Inc. v. City of Cocoa Beach, Fla.*, 629 F.2d 1146, 1149, n. 2 (5th Cir. 1980). Accordingly, the district court's reliance on those two factors in denying fees was clearly erroneous and was properly reversed by the court of appeals.

Finally, the district court also added into its formula for special circumstances the fact that one of the respondents is a partisan political organization. No

authority is cited by the court on that point, and the legal significance of that status in relation to the application of §1988 is left entirely unexplained. It could not have been a suggestion that respondents do not enjoy the protection of 42 U.S.C. §1983, and there is certainly nothing obviously different, in terms of the remedial purpose of §1988, about the Concerned Democrats as a plaintiff than, for example, the plaintiff political group in *Iranian Students Association v. Edwards*, 604 F.2d 352 (5th Cir. 1979), or the plaintiff corporate commercial enterprise in *International Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502 (5th Cir. 1980). Lacking a legal context, the district court's reference to political status appears to be an afterthought and was not found to be persuasive by the court of appeals.

The district court was plainly concerned by the fact that the case at bar did not present a claim of racial discrimination. This is apparent from the court's repeated references to that point. *Concerned Democrats v. Reno*, 493 F.Supp. 660, 662 n. 2, 663, 664 (S.D. Fla. 1980). But that contention was laid to rest by the Fifth Circuit in *Aware Woman Clinic, Inc. v. City of Cocoa Beach, Fla.*, 626 F.2d 1146, 1148 (5th Cir. 1980), holding that §1988 applies to all types of §1983 actions, "not merely those alleging invidious discrimination. . . ." Indeed, this Court has held that for §1988 purposes, the underlying §1983 claim need not even be of constitutional dimension. *Maine v. Thiboutot*, ____ U.S. ____, 100 S.Ct. 2502, 2506 (1980) (fees under §1988 "are available in *any* §1983 action," constitutional or statutory); *accord, Maher v. Gagne*, ____ U.S. ____, 100 S.Ct. 2570 (1980).

Again, the decision of the court of appeals was merely a correction of a plain misapprehension of the controlling law by the district court. Indeed, the rationale of the district court's denial of fees on remand was so discordant with settled authority as to persuade the court of appeals to enter an outright reversal rather than to remand again to the district court. Faced with a recalcitrant district judge, the court of appeals found it appropriate, in the interest of judicial economy, to make the fee award itself under the procedures set forth in *Davis v. Roadway Express, Inc.*, 590 F.2d 140, 143 (5th Cir. 1979). *See also, Brown v. Culpepper*, 561 F.2d 1177 (5th Cir. 1977).

In summary, the case at bar is paradigmatically inappropriate for review by writ of certiorari. There is no conflict with the decisions of other courts of appeal or the decisions of this Court. The circumstances that resulted in two reversals of the district court for failure to follow settled doctrine are, if not *sui generis*, at least unlikely to recur in future litigation. The court of appeals did no more than to correct a clear misapplication by the district court of 42 U.S.C. §1988. In short, this case presents no occasion for this Court to decide an important question of federal law under Rule 17.1(c) or to exercise its supervisory authority over lower federal courts under Rule 17.1(a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Steven Wisotsky
Michael R. Masinter
Nova University Law Center
Counsel for Respondents

By /s/ STEVEN WISOTSKY
Steven Wisotsky